UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and SOUTH CAROLINA CHAMBER OF COMMERCE, Plaintiffs, vs. NATIONAL LABOR RELATIONS BOARD, and MARK PEARCE, in his official capacity as Chairman of the National Labor Relations Board, and CRAIG BECKER, in his official capacity as member of the National Labor Relations Board, and BRIAN HAYES, in his official capacity as member of the National Labor Relations Board, and LAFE SOLOMON, in his official capacity as General Counsel, Defendants.	CIVIL ACTION NO: 2:11-cv-02516-PMD

VERIFIED COMPLAINT
FOR INJUNCTIVE RELIEF

This Complaint arises under the Administrative Procedures Act ("APA"), 5 U.S.C. § 702, Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 611, and First Amendment to the Constitution of the United States. Plaintiffs Chamber of Commerce of the United States of

America ("COCUS") and South Carolina Chamber of Commerce ("SCCC") (collectively, "Plaintiffs") bring this action against the National Labor Relations Board and its Chairman, two Members, and General Counsel, all in their official capacities (collectively, "NLRB," "Board," or "Defendants"). Plaintiffs seek (1) injunctive relief to enjoin Defendants from enforcing a final rule regarding Notification of Employee Rights Under the National Labor Relations Act ("Notification Rule"); (2) a declaratory judgment holding that the promulgation of the Notification Rule violates the APA, the RFA, and First Amendment; and (3) all other appropriate relief.

Plaintiffs, by their undersigned attorneys, as and for their Complaint, respectfully state as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. This action arises under and concerns provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 *et seq.*, including, but not limited to, the Board's rulemaking authority under section 6.

2. This Court has jurisdiction to review a final agency action by the Board pursuant to 5 U.S.C. § 702 (the APA) and 5 U.S.C. § 611 (the RFA). This Court also has authority to grant the requested relief pursuant to 28 U.S.C. § 1651 (All Writs Act), 28 U.S.C. § 2201 (Declaratory Judgment Act), and 28 U.S.C. § 2202 (further relief).

3. Venue in the District of South Carolina is proper under 28 U.S.C. § 1391(e) because the SCCC is a corporation within the District of South Carolina and therefore resides in South Carolina, because both the SCCC and COCUS have members that are

incorporated and reside in South Carolina, and because the Notification Rule will adversely impact Plaintiffs and their members in South Carolina.

PARTIES

4. Plaintiff COCUS is the world's largest federation of businesses and associations. COCUS represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size and in every industry sector and geographic region throughout the country, as well as several thousand state and local Chambers of Commerce. More than 96% of COCUS members are small businesses with 100 employees or fewer.

5. Plaintiff SCCC is a membership organization that resides in South Carolina and represents businesses throughout the state. The SCCC is a member in good standing of COCUS and is the state's largest business trade and commerce organization. It represents businesses, industries, professions, associations, and employers of all sizes and types with a unified voice, and promotes the development and expansion of new and existing businesses and industries in the state. Its efforts, in turn, benefit the public, raising the standard of living for South Carolina's citizens. SCCC has members throughout South Carolina.

6. Defendant NLRB is an independent federal agency. The NLRB promulgated, and would enforce, the Notification Rule, pursuant to 29 U.S.C. § 156.

7. Mark Pearce is the Chairman of the NLRB. He is sued in his official capacity pursuant to 5 U.S.C. § 703.

8. Craig Becker is a Member of the NLRB. He is sued in his official capacity pursuant to 5 U.S.C. § 703.

9. Brian Hayes is a Member of the NLRB. He is sued in his official capacity pursuant to 5 U.S.C. § 703.

10. Lafe Solomon is the NLRB's General Counsel. He is sued in his official capacity pursuant to 5 U.S.C. § 703.

STATEMENT OF FACTS

11. On December 22, 2010, the NLRB published a Notice of Proposed Rulemaking in the Federal Register. Among other things, the proposed rule would require employers to post notices informing their employees of certain rights, including their right to form a union pursuant to the NLRA. 75 Fed. Reg. 80,410 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104).

12. In submitting the proposed rule for notice and comment, the Board did not perform an Initial Regulatory Flexibility Analysis.

13. The NLRB received more than 7,000 comments on the proposed rule. Most comments opposed promulgation of a final rule.

14. Notwithstanding the opposition to the proposed rule, on August 30, 2011, the NLRB promulgated the Notification Rule at 76 Fed. Reg. 54,006. The Rule is to be codified at 29 C.F.R. Part 104. Its effective date is November 14, 2011.

15. The Notification Rule constitutes final agency action.

16. Then-Chairman Liebman, Member Pearce, and Member Becker voted in favor of the Rule. Member Hayes voted against it and wrote a Dissenting View.

17. In promulgating the Notification Rule, the NLRB certified that it would not have a substantial economic impact on a substantial number of small entities. Accordingly, the NLRB did not conduct a Final Regulatory Flexibility Analysis.

18. In promulgating the Notification Rule, the NLRB violated the APA, 5 U.S.C. § 706, and the RFA, 5 U.S.C. §§ 603 and 604. The NLRB also violated the First Amendment in violation of the U.S. Constitution and in violation of the APA, 5 U.S.C. § 706(2)(A) and the National Labors Relation Act ("NLRA"), 29 U.S.C. § 158(c).

FOR A FIRST CAUSE OF ACTION
(The NLRB Lacks Statutory Authority Under the NLRA)

19. Paragraphs 1 through 18 are incorporated herein by reference as if set forth in full.

20. As authority for the Notification Rule, the NLRB relies upon section 6 of the NLRA. Section 6 of the NLRA, in turn, authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156.

21. Section 104.202(a) of the Notification Rule provides, in pertinent part, that "[a]ll employers subject to the NLRA must post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information containing basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this part."

22. Section 104.210 of the Notification Rule states, in pertinent part, that "[f]ailure [by employers] to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. § 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1)." Section 104.210 of the Rule further provides that "the Board will determine whether an employer is in compliance [with the Notification Rule] when a person files an unfair labor practice charge alleging that the employer has failed to post the employee notice required [under Subpart B of the Rule]."

23. Section 102.214(a) of the Rule provides for the tolling of the statute of limitations for unfair labor practice charges. Section 102.214(a) provides, in pertinent part, that "[w]hen an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful."

24. The NLRB lacks the statutory authority to impose any of these requirements. Neither section 6 of the NLRA, nor any other provision of the NLRA, grants the NLRB the authority to require employers to post such a notification, to create and promulgate a new unfair labor practice where an employer covered under the NLRA fails to post a Notice, or to toll the statute of limitations.

25. Instead, the Board's authority to administer the provisions of the NLRA is triggered when a representation petition is filed pursuant to section 9(c)(1), 29 U.S.C. § 159(c)(1), or an unfair labor practice charge is filed pursuant to section 10(b), 29 U.S.C. § 160(b). Neither section 6 of the NLRA, nor any other section of the NLRA, contains any specific provision granting the Board the authority to assert jurisdiction over any employer absent the filing of a representation petition or unfair labor practice charge.

26. The promulgation and issuance of Section 102.214(a) of the Notification Rule also violates section 10(b) of the NLRA, 29 U.S.C. § 160(b). Section 10(b) provides, in pertinent part, that "[n]o complaint shall issue based upon any unfair labor practice charge occurring more than six (6) months prior to the filing of the charge with the Board and service of a copy thereof upon a person against whom such charge is made unless

the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six (6) month period shall be computed from the day of his discharge."

27. Accordingly, the Notification Rule violates the APA, 5 U.S.C. § 706(2)(C).

28. Unless enjoined, the Notification Rule will cause immediate, irreparable damage to Plaintiffs and their members. Such damage includes, but is not limited to, the following: forcing Plaintiffs and their members to incur substantial monetary costs; damaging the relationships that Plaintiffs and their members have with their employees; and hampering the ability of Plaintiffs and their members to engage in normal business activities.

29. In addition, the Notification Rule creates a substantial risk that Plaintiffs and their members could suffer all of the punitive sanctions set forth in the Notification Rule for minor or inadvertent violations. Plaintiffs' members include many small entities who lack internal legal counsel or dedicated human resources professionals. If these entities fail to post the mandated notice through simple inadvertence or lack of knowledge of the Rule, they could nevertheless be found guilty of an unfair labor practice and suffer the other punitive sanctions set forth in the Rule. Although the Board repeatedly suggests that it will not punish minor or inadvertent infractions severely, the Board has no authority to provide such assurances because section 3(d) of the NLRA vests enforcement authority in the Board's General Counsel.

30. Furthermore, unless immediately restrained, the Notification Rule will result in a likelihood of irreparable harm to the citizens of this community, as well as to Plaintiffs, their members, and their employees. The granting of an Order enjoining the Notification

Rule, and declaring it unlawful, will not cause financial loss or damage to Defendants, but will protect Plaintiffs' members, employees, contractors, subcontractors, and the employees of those contractors and subcontractors, from further irreparable harm.

31. As of the date and time of the filing of this Verified Complaint, the First Amendment interests of Plaintiffs are threatened, and the loss of Plaintiffs' First Amendment freedoms, even for a minimal period of time, unquestionably constitutes irreparable injury.

32. Because Defendants will suffer no damage as the result of issuance of injunctive relief, Plaintiffs request that bond be waived.

FOR A SECOND CAUSE OF ACTION
(The NLRB's Action is Arbitrary and Capricious under the APA)

33. Paragraphs 1 through 32 are incorporated herein by reference as if set forth in full.

34. The actions of the NLRB are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Board failed to meaningfully consider contrary evidence and numerous legal, policy, and economic considerations, or to articulate a rational basis for addressing them.

35. Specifically, the Taft-Hartley Act of 1947 included section 14(b) [29 U.S.C. § 164(b)]. That section of the Taft-Hartley Act constituted a fundamental change in the direction of federal labor law in that it granted to employees for the first time, in those states that chose to exercise their section 14(b) powers, the right to be free of compulsory union membership and compulsory union dues.

36. Twenty-two states have exercised their powers under section 14(b) and enacted right-to-work statutes. The NLRB has elected to exclude from the mandated notice fundamental section 14(b) employee rights that exist in these twenty-two states.

37. South Carolina's right-to-work statute, which is one of the strongest for the protection of employee rights, is codified in sections 41-7-10 through 41-7-100 of the South Carolina Code of Laws.

38. South Carolina's right-to-work law effectively prohibits agreements between any union and an employer that would force South Carolina employees to join a union or even pay dues to a union.

39. The rights given to employees by section 14(b) of the Taft-Hartley Act and the various state right-to-work statutes are fundamental rights that are just as important, if not more so, than the rights the NLRB has chosen to include in the mandated notice.

40. The NLRB's comments in the August 30, 2011, *Federal Register* demonstrate that the NLRB failed to meaningfully consider the above factors that are relevant to the disclosure of section 14(b) employee rights in the mandated notice.

41. It was a clear error of judgment for the NLRB not to meaningfully consider the above factors that are relevant to the disclosure of section 14(b) employee rights in the mandated notice.

42. When it suited the NLRB's inclination to exclude a right from the mandated notice, it emphasized that the particular employee right did not appear in the law enforced by the NLRB. Section 14(b) employee rights, however, are fundamental to the statute enforced by the NLRB, and yet it failed to meaningfully analyze the importance of these rights and the reasons for disclosing them in the mandated notice.

43. The actions of the NLRB in failing to disclose section 14(b) employee rights in the mandated notice, or to even consider such inclusion in any legally meaningful way, was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

44. Furthermore, the Board's justification for the required notice is, in part, to enable employees to exercise their statutory rights.

45. The Board requested "comments on whether the notice contain[ed] sufficient information about employee rights [and] whether it effectively achieves the desired balance between providing an overview of employee rights and limiting unnecessary and distracting information." 75 Fed. Reg. 80,413.

46. While the Board asserts that the purpose of the notice is to ensure employees are aware of their rights, the notice arbitrarily focuses on the rights of non-union employees. The notice fails to include rights that are equally important to union and non-union employees.

47. As such, the Board's selection of rights for inclusion in the notice was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

48. As justification for the NLRB's final rule, the Board relies on anecdotes, localized studies from the mid-1990s, and dubious inferences based on the decline in union density and increase in immigration.

49. Finally, the NLRB's final rule fails to consider contrary studies and relies on insufficient empirical data.

50. For all these reasons, the final rule is arbitrary and capricious and does not provide the requisite substantial evidence and reasoned analysis to justify the final rule, in contravention to the APA.

FOR A THIRD CAUSE OF ACTION
(The NLRB's Action Violated the RFA)

51. Paragraphs 1 through 50 are incorporated herein by reference as if set forth in full.

52. The RFA requires an agency that has proposed a rule to prepare and make available for public comment an initial and final regulatory flexibility analysis. This initial flexibility analysis "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). The final regulatory flexibility analysis, which is provided in connection with the promulgation of the final rule, requires a description of (i) the reasons why action by the agency is being considered, (ii) a succinct statement of the objectives of, and legal basis for, the proposed rule, (iii) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply, and (iv) a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C. § 604(a).

53. An agency can avoid performing these analyses if the agency's head certifies that the rule will not have a significant economic impact on a substantial number of small entities. The certification must include a statement providing the factual basis for the agency's determination that the rule will not significantly impact small entities. 5 U.S.C. § 605.

54. The Board certified that the Notification Rule would not have a significant economic impact on a substantial number of small entities. 76 Fed. Reg. 54,042.

55. In making this certification, the Board understated the economic impact of the Notification Rule and failed to provide adequate factual bases for its cost estimates. For example, the Board failed to provide any factual basis for its estimate that each employer subject to the Notification Rule will spend a total of only two hours on compliance with the Rule during the first year in which the Rule is in effect. In addition, the Board failed to meaningfully consider or address the weight of the comments submitted in response to the initial Notice of Proposed Rulemaking, as well as the cost estimates contained in those comments.

56. Contrary to the NLRB's position, the rulemaking record demonstrates that the Notification Rule would impose a significant economic impact on a substantial number of small entities. These costs include, but are not limited to, monetary costs associated with educating human resource professionals and management about the notice, educating employees about the notice, answering questions about the notice, posting the notice, and monitoring the notice to ensure that it remains posted. Other aspects of the Notification Rule's significant economic impact include, but are limited to, an adverse impact on employee relations and interference with normal business operations.

57. The NLRB also failed to describe the steps it took to minimize the Rule's significant economic impact on small entities, and failed to discuss any significant alternatives to the proposed rule which would accomplish the stated objectives of the applicable statutes.

58. Accordingly, the NLRB was required to conduct the regulatory flexibility analyses.

FOR A FOURTH CAUSE OF ACTION
(The NLRB's Action Violated the First Amendment)

59. Paragraphs 1 through 58 are incorporated herein by reference as if set forth in full.

60. Plaintiffs have standing to pursue this action on behalf of its members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), as (1) Plaintiffs' members would otherwise have standing to sue in their own right, (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes, and (3) neither the claims asserts nor the relief requested requires the participation of Plaintiffs' individual members.

61. Plaintiffs' members would have standing to sue in their own right, as threatened, imminent, and certain injury will occur when the Rule takes effect on November 14, 2011. This loss of First Amendment freedom—the right to be free from compelled speech with which Plaintiffs and Plaintiffs' members have ideological differences—unquestionably constitutes irreparable injury.

62. This Rule is aimed directly at Plaintiffs and Plaintiffs' members, who will be required to comply with the Rule or risk the threat of an unfair labor practice ("ULP") investigation by Defendants. The harm is not abstract, but instead, is a certainty—Defendants have not suggested that the Rule will not be enforced.

63. Even if Defendants do not investigate Plaintiffs and Plaintiffs' members for ULPs, the injury caused by this Rule is one of self-censorship—Plaintiffs and Plaintiffs'

members will be forced to espouse views with which they do not agree, in contravention of the First Amendment's prohibition against compelled speech.

64. The instant case is fit for judicial review, as Defendants' Rule is a final agency action, which Plaintiffs and Plaintiffs' members will be required to comply with when the Rule takes effect on November 14, 2011. Moreover, delayed adjudication will impose a hardship on Plaintiffs and Plaintiffs' members as, on November 14, they will be forced to comply with a Rule passed without proper authority which espouses an ideological message with which they do not agree. This loss of First Amendment freedom, for even a minimal period of time, constitutes irreparable harm.

65. The Notification Rule's notice posting requirement dictates that employers post on their private property a notice that espouses Defendants' ideological message through an assertion of employees' statutory "rights" and employer "obligations." 76 Fed. Reg. 54,048 (App'x to Subpart A – Text of Employee Notice).

66. The First Amendment protects corporations in the same way that it protects individual citizens.

67. Plaintiffs' members possess First Amendment rights on their private property.

68. Included in the right to free speech under the First Amendment is a right *not* to speak, i.e., to be free from compelled speech.

69. The Notification Rule's Text of Employee Notice constitutes compelled "non-commercial speech" that is entitled to the highest form of protection; any restraint on this speech, therefore, must pass strict scrutiny.

70. The Notification Rule's notice posting requirement cannot pass strict scrutiny, as it is not narrowly tailored to a compelling governmental interest.

71. The Notification Rule's notice posting requirement unconstitutionally compels Plaintiffs' members to espouse ideological views with which they do no agree, in violation of the First Amendment.

72. Accordingly, the Notification Rule violates the U.S. Constitution, the APA, 5 U.S.C. § 706(2)(A), and the NLRA, 29 U.S.C. § 158(c).

WHEREFORE, Plaintiffs pray for relief as follows:

(a) That this Court take jurisdiction of the parties hereto and the subject matter hereof;

(b) That this Court declare that the Board exceeded its authority under section 6 of the NLRA in promulgating the Notification Rule;

(c) That this Court declare that the Notification Rule is null and void in its entirety under the Administrative Procedure Act;

(d) That this Court declare that the Notification Rule is null and void in its entirety under the Regulatory Flexibility Act;

(e) That this Court declare that the Notification Rule is null and void in its entirety, as it violates Plaintiffs' First Amendment rights;

(f) That this Court declare that forthwith and pending further hearing and until further order of this Court, Defendants and others acting in concert with it be enjoined from enforcing the Notification Rule;

(g) That judgment be entered in favor of Plaintiffs against Defendants for expenses of this litigation, including reasonable attorneys' fees;

(h) That judgment be entered in favor of Plaintiffs against Defendants for all costs of this action;

(i) That this Court retain jurisdiction to enforce the terms of any order entered;

(j) That this Court declare that Plaintiffs have the right to amend this Complaint to reflect damages that may become ascertainable while this action is pending; and

(k) That this Court grant such other and further relief as may be just and proper.

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Dated this 19th day of September, 2011.

Respectfully submitted,

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